Abdul Razak bin Sheikh Mahmood & Ors v Amanah Raya Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(NCC)(W)-547–04 OF 2015 AND W-02(NCC)(W)-541–04 OF 2015
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
15 JANUARY 2018

Civil Procedure — Res judicata — Subsequent suit with same subject matter and same parties — Consent judgment entered between parties in earlier suit — Respondents sued appellants due to non-compliance of consent judgment — Appellants sued respondents for specific performance — Whether res judicata applicable — Whether there were grounds to set aside consent judgment

Contract — Breach — Specific performance — Appellants commenced action against respondents for breach of consent judgment in relation to proposed joint venture and claimed specific performance of joint venture agreement — Whether there was an agreement — Whether appellants entitled to relief of specific performance — Whether there were grounds for court to set aside consent judgment

The appellants, vide Suit 375, had filed an action against the respondents for breach of trust and purported mismanagement of the appellants' investments by Amanah Raya Investment Management Sdn Bhd. Consent judgment was entered between the parties for Suit 375. Subsequently, due to the non-compliance of payment obligations under the consent judgment by the appellants, the respondents sued the appellants for payment of the outstanding loans extended to the appellants ('Suit 1471'). In response, the appellants commenced an action against the respondents for, inter alia, breach of the consent judgment, in relation to the proposed joint venture and claimed specific performance of the joint venture agreement and in the alternative prayed for an order that the consent judgment be set aside ('Suit 650'). The High Court found in favour of the respondents in both Suits 650 and 1471, hence the present appeals. The issues arose were: (a) whether there were grounds apparent to the court which would allow the appellants to set aside the consent judgment; and (b) whether the appellants were entitled to the relief of specific performance of the joint venture agreement between the parties.

Held, dismissing both appeals with agreed costs of RM50,000 subject to payment of allocator fees:

(1) There was little doubt that the parties in the present appeals were the same as in Suit 375 where the consent judgment emanated from. Further, the cause of action and the factual matrix upon which that suit was premised on was the same as here. Hence, there was no merit in the appellants' stand as they were attempting to relitigate on matters which had been adjudicated before. The principle of res judicata ought to be apply here. In addition, there was no immediate steps taken by the appellants to set aside the consent judgment (see paras 21 & 23).

(2) Based on the testimony of the second respondent in cross examination, the said witness could not inform the court what were the terms of the joint venture agreement. The law was clear in that unless and until the terms of any agreement had been identified with certainty, they could not be any agreement. In addition, the joint venture agreement was supposed to be for the benefit of ARSM trust and that party was not before the present court, thus weakening the position of the appellants (see para 28).

(3) It was contrary to business sense to forgo the recovery of a debt premised on a joint venture which may or may not be successful. The recovery of the loan was at all material time the undeniable right of the respondent. Furthermore, the terms of the consent judgment did not contain words which state that the payment of the loan amount by the appellants were to be sourced from the proceeds of the joint venture. Without such clear words, the court could not infer meanings as put forth by the appellants (see paras 30–31).

[Bahasa Malaysia summary

Perayu-perayu, melalui Guaman 375, telah memfailkan tindakan terhadap responden-responden untuk pelanggaran amanah dan bagi maksud salah pengurusan pelaburan-pelaburan perayu-perayu oleh Amanah Raya Investment Management Sdn Bhd. Penghakiman persetujuan telah dimasuki antara pihak-pihak untuk Guaman 375. Berikutan itu, akibat ketidakpatuhan obligasi bayaran di bawah penghakiman persetujuan oleh perayu-perayu, responden-responden telah menyaman perayu-perayu untuk bayaran baki pinjaman yang diberikan kepada perayu-perayu ('Guaman 1471'). Sebagai tindak balas, perayu-perayu telah memulakan tindakan terhadap responden-responden untuk, antara lain, pelanggaran penghakiman persetujuan, berkaitan cadangan usahasama dan menuntut pelaksanaan spesifik berhubung perjanjian usahasama itu dan sebagai alternatif memohon untuk perintah agar penghakiman persetujuan diketepikan ('Guaman 650'). Mahkamah Tinggi mendapati menyebelahi responden-responden dalam kedua-dua Guaman 650 dan 1471, justeru rayuan-rayuan ini. Isu-isu yang timbul adalah: (a) sama ada terdapat alasan-alasan yang jelas kepada mahkamah yang membenarkan perayu-perayu mengetepikan penghakiman persetujuan; dan (b) sama ada perayu-perayu berhak kepada relif pelaksanaan spesifik berhubung perjanjian usaha sama antara pihak-pihak.

Diputuskan, menolak kedua-dua rayuan dengan kos yang dipersetujui berjumlah RM50,000 tertakluk kepada bayaran fi alokatur:

(1) Tiada keraguan bahawa pihak-pihak dalam rayuan-rayuan ini adalah sama sepertimana dalam Guaman 375 di mana berpuncanya penghakiman persetujuan. Selanjutnya, kausa tindakan dan matriks faktual yang mana guaman tersebut berpremiskan adalah sama di sini. Justeru, tiada merit dalam pendirian perayu-perayu kerana mereka cuba melitigasikan semula perkara-perkara yang telah diadili sebelum ini. Prinsip res judicata patut terpakai di sini. Tambahan, tiada langkah-langkah segera yang telah diambil oleh perayu-perayu untuk mengetepikan penghakiman persetujuan (lihat perenggan 21 & 23).

(2) Berdasarkan testimoni responden kedua dalam pemeriksaan balas, saksi tersebut tidak memberitahu mahkamah terma-terma perjanjian usahasama itu. Undang-undang adalah jelas di mana kecuali dan sehingga terma-terma apa-apa perjanjian telah dikenalpasti dengan pasti, maka tidak boleh ada apa-apa perjanjian. Selain itu, perjanjian usahasama itu sepatutnya memberi manfaat kepada amanah ARSM dan bahawa pihak tersebut tidak dihadapkan di mahkamah ini, oleh itu melemahkamah kedudukan perayu-perayu (lihat perenggan 28).

(3) Ia adalah bertentangan dengan amalan perniagaan untuk melepaskan pemulihan hutang berasaskan suatu usahasam yang mungkin atau tidak mungkin berjaya. Untuk mendapat balik pinjaman itu adalah pada setiap masa matan hak responden yang tidak dinafikan. Tambahan pula, terma-terma penghakiman persetujuan tidak mengandungi perkataan-perkataan yang menyatakan bahawa bayaran jumlah pinjaman oleh perayu-perayu akan diperoleh daripada hasil usaha sama itu. Tanpa kata-kata yang jelas, mahkamah tidak dapat membuat kesimpulan yang bermakna seperti yang dikemukakan oleh perayu (lihat perenggan 30–31).]

Notes

For cases on res judicata in general, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8306–8494.

For cases on specific performance, see 3(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4062–4065

Legislation referred to

Contracts Act 1950 ss 53, 55

Appeal from: Suit Nos 22 NCC-650–04 of 2012 and 22 NCC-1471–10 of 2012 (High Court, Kuala Lumpur)

Ambiga Sreenevasen (Michael Chow, TP The and Sarah with her) (Michael Chow) for the appellants.
Cecil WM Abraham (Rishwant Singh and Chua Vi Cher with him) (Cecil Abraham & Partners) for the respondents.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] Before us are two appeals, namely W-02(NCC)(W)-541–04 of 2015 ('Appeal 541') and W-02(NCC)(W)-547–04 of 2015 ('Appeal 547') and by consent both appeals were heard together.

[2] Appeal 547 is related to a KL High Court Suit No 22NCC-650–04 of 2012 where the appellants were the plaintiffs and had sought for an order of specific performance of a joint venture agreement with the second respondent pursuant to a consent order dated 28 July 2010 ('consent judgment') in respect of two pieces of land in Kampung Baru or in the alternative, the consent order to be set aside. In the same suit, the respondents counterclaimed for an order that they be released from the obligations of the purported joint venture agreement. The learned High Court judge dismissed the appellants' claims and allowed the counterclaims of the respondents.

[3] Appeal 541 culminated from a KL High Court Suit No 22NCC-1471–10 of 2012, where the third respondent in Appeal 547, namely Amanah Raya Capital Sdn Bhd, and the respondent in Appeal 541 sued Abdul Razak bin Sheikh Mahmood and his son Kamil Azman bin Abdul Razak, the first and second appellants in Appeal 547 and the appellants in Appeal 541 for the principal sum of RM4,259,2017.69 and RM5,380,142.98 payable under the consent order. The learned judge in the High Court sustained the claims of the respondent and the third respondent in Appeal 541.

[4] We heard both appeals and after hearing respective counsel we dismissed the same with costs. We now give our reasons for our decision.

[5] In this judgment, parties for ease of reference will be referred to by their respective names and where appropriate the parties will be referred to as appellants and respondents respectively.

BACKGROUND FACTS

[6] Amanah Raya Capital Sdn Bhd had on or about 17 September 2007 and 19 October 2007 granted a loan to the Abdul Razak bin Sheikh Mahmood ('Abdul Razak') and Kamil Azman bin Abdul Razak ('Kamil Azman') a sum of

RM5m each. Kamil Azman had on or about 19 October 2007 also executed a guarantee to guarantee the payment to Amanah Raya Capital Sdn Bhd on demand all sums of money which may be due and owing by Abdul Razak to Amanah Raya Capital Sdn Bhd.

[7] In another suit, namely No D-22NCC-375 of 2009 ('Suit 375'), a consent order was entered into between Abdul Razak, Kamil Azman, Kalsombi bt VK Majid and Excel Beat Sdn Bhd with Amanah Raya Bhd, Amanah Raya Capital Sdn Bhd, Amanah Raya Investment Management Sdn Bhd and Amanah Raya Development Sdn Bhd to compromise the claims therein.

[8] In Suit 375, the claim was related to a claim for, among others, breach of trust and purported mismanagement of the plaintiffs' investments by Amanah Raya Investment Management Sdn Bhd (previously known as Amanah Raya — JMF Asset Management Sdn Bhd).

[9] The consent order provides, inter alia, that:

> 3. The 1st and 2nd Plaintiffs (Abdul Razak and Kamil Azman) agreed that on the maturity date, which the parties hereby agree to be 27.7.2012, the following sums shall be payable to the 2nd Defendant (Amanah Raya Capital Sdn Bhd):
>
> (a) the 1st Plaintiff (Abdul Razak) shall pay the 2nd Defendant (Amanah Raya Capital) the sum of RM4,226,783.05; and
>
> (b) the 2nd Plaintiff (Kamil Azman) shall pay the 2nd Defendant (Amanah Raya Capital) the sum of RM RM5,339,184.85.
>
> ('Loan Payment')
>
> 4. In the event that the above payments are not paid by the 1st Plaintiff and/or the 2nd Plaintiff on 27.7.2012 as stipulated, a default interest at the rate of 8%pa, calculated on a daily rest, will be charged on the total amount due and remaining unpaid or any part thereof, from the dates the monies are due until the payment date.
>
> ...
>
> 9. The 1st Plaintiff and/or the 2nd Plaintiff (Abdul Razak and Kamil Azman) and/or their nominated entity shall enter into a Joint Venture Agreement, in form and substance as pre-agreed between the parties, with the 4th Defendant (Amanah Raya Development Sdn Bhd) and/or their nominated entity on/before 11.8.2010; ('Joint Venture')
>
> 10. The parties agree that they shall have no further claims against each other and undertake not to raise the allegations raised in this action in the future.

[10] There was non-compliance of the payment obligations under the consent judgment by Abdul Razak and Kamil Azman in that they did not or refuse to make any payments to Amanah Raya Capital Sdn Bhd as agreed to in

the said consent judgment. This resulted in Suit 1471 wherein Amanah Raya Capital Sdn Bhd sued for payment of the outstanding loans extended to them.

[11] However, on 28 April 2012, Abdul Razak, Kamil Azman, Kalsombi bt VK Majid and Excel Beat Sdn Bhd in Suit 650 commenced legal proceeding against Amanah Raya Bhd, Amanah Raya Development Sdn Bhd and Amanah Raya Capital Sdn Bhd for, inter alia, breach of the consent judgment, in relation to the proposed joint venture and claimed for specific performance of the joint venture agreement and in the alternative prayed for an order that the consent judgment be set aside.

THE HIGH COURT DECISION

[12] The learned judge in the High Court approached the trial anchored on basically three issues which were as follows:

(1) are the claims of the appellants barred by the consent judgment?

(2) are the appellants entitled to sue for specific performance of the joint venture agreement? and

(3) whether Amanah Raya Bhd was empowered to engage in commercial activity?

CONSENT ORDER

[13] In respect of issue 1, the learned judge found that the appellants were barred from initiating their suit premised on cl 10 of the consent order which reads as follows:

> 10. The parties agree that they shall have no further claims against each other and undertake not to raise the allegations raised in this action in the future.

[14] This was how the learned judge put it:

> SETTING ASIDE THE CONSENT JUDGMENT
>
> [23] I find that the plaintiffs do realise the effect of the consent judgment as elaborated earlier in this judgement. Otherwise it wouldn't be in their prayer that the same be set aside. It is also relevant to note that in this regard they had stated in their pleading that the consent judgment should be set aside as Amanah Raya had no intention to fulfil their obligations as provided in the same. They did not allege there was fraud, undue influence, coercion or the likes to challenge the consent judgment. All they say as stated is that Amanah Raya had no intention to honour the terms of the same.
>
> [24] First, even if the allegation as noted above from the plaintiffs amounts to fraud, this must be particularized in their pleading, which they have not done. In this regard it is relevant to note the provision of O 18 r 12 of the Rules of Court 2012

as it reads:

> Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words —
>
> (a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; ... (Emphasis added.)

[25] The Federal Court's case of *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799 is also of relevance where it states:

> In relation to pleadings in general, the rules of court require a pleading of fraud to contain particulars of the fraud on which the party pleading relies (see O 18 r 12(1)(a) of the Rules of the High Court 1980, now Rules of Court 2012). When fraud is alleged it must be specifically pleaded. The mere allegation of fraud without showing facts to support it is not a matter to which the court will pay serious attention (*Wallingford v Mutual Society and Official Liquidator* (1880) 5 App Cas 685 at p 697. The party need not use the word 'fraud' if he pleads, in unambiguous language, acts which amount in law to fraud (*Myddleton v Lord Kenyon* (1794) 2 Ves 391 at p 412). Whenever fraud or misrepresentation is alleged in a pleading, or any affidavit, full particulars of the alleged fraud or misrepresentation must be given (Spencer Bower, Turner and Handley, *Actionable Misrepresentation* (4th Ed) at pp 384–385). (Emphasis added.)

[26] Second, there was no evidence during the trial to suggest that Amanah Raya indeed had never intended to fulfil their side of the bargain in respect of the consent judgment. The plaintiffs never adduced any evidence to this effect.

JOINT VENTURE

[15] In respect of issue 2, this is what the learned judge said:

> SPECIFIC PERFORMANCE
>
> [27] The plaintiffs in the first suit seek for an order for specific performance of the joint venture agreement that was contemplated between parties before the recording of the consent judgment.
>
> [28] It is trite law that there must be a completed contract in which the plaintiffs can sue for specific performance or damages.
>
> [29] I find again there is no evidence adduced in the trial by the plaintiffs there was a concluded or complete contract between the parties for the joint venture. Therefore specific performance cannot be granted to the plaintiffs.
>
> [30] The case of *Low Kar Yit & Ors v Mohamed Isa & Anor* [1963] 1 MLJ 165 held as follows:
>
> > Lord Greene MR in the case of *Eccles v Bryant and Pollock* [1948] 1 Ch 93 in the opening passage of his judgment said:
> >
> > > This case is one of that long series of cases which no doubt will go on as

> long as contracts take place, in which one party to a transaction, which was intended to produce a contract and was carried on the usual condition that it was to be subject to contract, is attempting to say that a contract came into existence at a date on which the other party says that negotiations had not yet been completed and that no binding contract had come into existence at all.

Those prophetic words of the learned Lord Master of the Rolls are equally true of this case. The conclusion to be drawn here, therefore, is the same as in that case, namely, that there is no completed contract on which the plaintiffs can sue for specific performance or damages.

In the result I have reluctantly come to the conclusion that there was no concluded contract between the parties to this action. I say 'reluctantly' because of the conduct of the defendants in breaking off the negotiations when the terms of the proposed agreement were agreed upon and in capriciously refusing to sign the agreement. However, in the words of Tomlin J in *Lockett v Norman Wright* 'it is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to *determine whether there is or is not a concluded contract between the plaintiffs and the defendants which the plaintiffs can enforce*'. Accordingly, the action is dismissed with costs. (Emphasis added.)

[31] Also appropriate to take into account is the fact that the plaintiffs are seeking for a non-concluded contract to be enforced for the benefit of a party who is not before this court (ie ARSM Trust) in these proceedings. ARSM Trust is not a legal entity in any event. This court therefore should not be minded to grant the specific performance claimed by the plaintiffs.

[32] Kamil Azman's evidence in this regard is as follows:

> CA : No answer my question. Is ARSM Trust a Plaintiff?
>
> KAMIL; It is not a Plaintiff.
>
> CA : Yes ok. If they are not a Plaintiff can you then tell us how can you have specific performance with a non- party.
>
> KAMIL : Because I'm referring to the consent order.
>
> CA : So your evidence is a non-party can get specific performance.
>
> KAMIL : No.
>
> CA: Is that, is that your evidence?
>
> KAMIL : No.
>
> CA : It is not, ok. And you gave instructions for the drafting of this statement of claim? Did you?
>
> KAMIL : Yes.

POWER OF AMANAH RAYA CAPITAL BHD TO ENGAGE IN COMMERCIAL TRANSACTION

[16] In respect of issue 3, the learned judge said as follows:

[41] Further, although both had challenged statutorily Amanah Raya Capital ability to engage in commercial activities, there is not an iota of evidence to show that the loan facilities extended by Amanah Raya Capital is ultra vires the Public Trust Corporation Act and Amanah Raya Bhd's memorandum and articles of associations.

[42] Section 3 of the Public Trust Corporation Act 1995 provides that:

> There shall be a Corporation incorporated under the Companies Act 1965 under the name of 'Amanah Raya Berhad'.

[43] The Parliamentary Hansard dated 19 October 1994 before the enactment of the Public Trust Corporation Act 1995 clearly shows that Amanah Raya Bhd was intended to be a hybrid between a private company and a company regulated by the statute. The relevant paragraph in its original language reads;

> Fasal 3 memberi pengiktirafan status kepada perbadanan yang diperbadankan sebagai sebuah syarikat di bawah Akta Syarikat 1965 ... kerana ia mempunyai tanggungjawab sosial yang perlu dijalankan. lni lebih merupakan kacukan antara syarikat yang ditubuhkan di bawah statut dan syarikat persendirian. (Emphasis added.)

[44] It is also clear from Amanah Raya Bhd's memorandum of associations that one of the objects of Amanah Raya Bhd is to act and perform all the functions of a holding company.

[45] There is no dispute therefore that Amanah Raya Bhd as a holding company can form subsidiaries as per s 5 of the Companies Act 1965.

[46] It is also relevant to note that the High Court in the case of *Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman* [2014] 11 MLJ 464 has found that;

> ... The plaintiff (Amanah Raya Capital Sdn Bhd) is a licenced money lending company incorporated in Malaysia. (Emphasis added.)

[47] Confronted with these authorities, I do not agree as contended that since Amanah Raya Bhd is a statutory corporation, it can only do what the Public Trust Corporation Act 1995 permits it to do and since the 1995 Act does not permit Amanah Raya Bhd to enter into commercial business such as money lending and property development, its actions in this case is ultra vires the Act. I find Abdul Razak and Kamil Azman had failed to satisfy the argument on ultra vires as the statutory provisions, parliamentary Hansard and case law as narrated earlier indeed empower Amanah Raya Bhd itself and its subsidiaries to be engaged in commercial activities.

OUR GROUNDS OF DECISION: PRELIMINARIES

[17] From the outset of the appeal, learned counsel for the appellants informed the court that he was abandoning issue 3 relating to the power of Amanah Raya Bhd to engage in commercial activities. Thus, we had not deliberated on it.

[18] Learned counsel for the respondent however had raised objections to the submissions of the appellants in that the submissions had dealt with matters which were not raised or argued in the High Court. Those matters related to the unjust enrichment, constructive trust and mutual promises relying on ss 53 and 55 of the Contracts Act 1950. After hearing submissions from respective counsel, we sustained the objection of the learned counsel for the respondents except on the issue of mutual promises which we were of the view was an area which had been raised by the appellants at the trial court in the form of issues 1 and 2 set out by the learned judge.

[19] That being the case, we only deliberated on issues 1 and 2.

ISSUE 1

[20] To recapitulate, issue 1 was concerned with whether there were grounds apparent to us which would allow the appellants to set aside the consent judgment dated 28 July 2010. The law on setting aside consent judgment is more than settled and it is this. A consent judgment is only recorded when the respective litigants had agreed in writing as to how to resolve a legal suit. Once the consent judgment had been perfected, the parties are bound by it and the court is duty bound to enforce the agreed terms of the same. The court also cannot vary any of the agreed terms unless with the mutual consent of the parties. Hence, one can say that the court is functus officio or in other words, the court is bereft of jurisdiction to entertain any request to set aside such judgment.

[21] There is little doubt that the parties in the appeals before us are in essence the same as in Suit 375 where the consent judgment emanated from. Further the cause of action and the factual matrix upon which that suit was premised on was the same as here. We have examined the pleadings in Suit 375 and fully agreed with the position of the respondents that the appellants had attempted to deny their liability premised on the allegation that there had been inter alia breach of trust and purported mismanagement of the appellants' investments by Amanah Raya Investment Management Sdn Bhd. Suit 375 was of course settled with the consent judgment which we were concerned with. If one were to read the terms of the consent judgment, it was quite plain and obvious in anyone's view that there was a global settlement between the

respondents and appellants regarding the financial dealings between them. It had a 'catch all' provision in cl 10 which provided that parties are to have no further claims against each other.

[22] Learned counsel for the respondents had in our view set out very clearly the substantive similarity between this suit and Suit 375 and we found it appropriate to set it out here:

	Suit 375	Suit 650
Same parties	The plaintiffs in Suit 375 are the appellants herein and the defendants in Suit 375 are the respondents herein.	The plaintiffs in Suit 650 are the appellants herein and the defendants in Suit 375 are the respondents herein.
Purpose of the ARSM Trust	Paragraph 14 'The purpose of the ARSM Trust is to:	Paragraph 11 'Essentially, Suit 375 was based on allegations of, inter alia, breach of trust and/or fiduciary duties on the part of the defendants therein including various breaches of duties by, inter alia, the 1st Defendant as trustee of the therein described ARSM Trust which purpose was to, inter alia:
	14.1 develop the existing properties under the ARSM Trust;	11.1 develop the existing properties under the ARSM Trust;
	14.2 sell all non-income generating immovable Trust property with the proceeds to be reinvested into the ARSM Trust;	11.2 sell all non-income generating immovable trust property with the proceeds to be reinvested into the ARSM Trust;
	14.3 borrow monies for investment by the ARSM Trust to be secured by properties under the ARSM Trust;	11.3 borrow monies for investment by the ARSM Trust to be secured by properties under the ARSM Trust;

	14.4 to invest the ARSM Trust into a port folio of investment in accordance with the following investment guidelines: a. 50% in real estate; b. 25% in international blue chip or index-linked companies; c. 12.5% in growth stocks; d. 12.5% in Islamic overnight markets'.	11.4 to invest the ARSM Trust into a portfolio of investment in accordance with stipulated investment guidelines. The Plaintiffs shall during the trial of this action refer to the pleadings and documents filed in Suit 375'.
Claims that the respondents were in breach of trust	Paragraph 29 'Among other, the details of a breaches including breach of trust regarding the conduct of the investment in shares for the ARSM Trust by ARB, ARC and AR-JMF ...'	Paragraph 11 '... Suit 375 was based on allegations of, inter alia, breach of trust and/or fiduciary duties on the part of the defendants therein including various breaches of duties by, inter alia, the 1st Defendant as trustee of the therein described ARSM Trust ...' Prayer (c) '(c) a declaration that the 1st Defendant has acted in breach of trust'

Claims that the respondents knew or ought to have known of the duties and obligations towards ARSM Trust and claims on constructive trust	Paragraph 43A '... at all material times, ARC and or AR-JMF knew or ought to have known of the duties and obligations of ARB towards the ARSM Trust pursuant to the said Trust Deed including the duty to act in the best interest of the ARSM Trust such that ARC and AR-JMF were bound to act consistently with such duties and obligations and ARC and ABJMF would, inter alia, be liable as constructive trustees for the and any breaches by ARB of its duties as trustee and/or fiduciary'.	Paragraph 16 '... at all material times, each of the Defendants knew or ought to have known of the duties and obligations to act in the best interest of the ARSM Trust such that the 2nd and 3rd Defendants were also bound to act consistently with such duties and obligations and accordingly the 2nd and 3rd Defendants would, inter alia, be liable as constructive trustees for the and any breaches by the 1st Defendant of its duties as trustee and/or fiduciary' Prayer (d) '(d) a declaration that the 2nd and 3rd Defendants are constructive trustees and/or who have aided and abetted the 1st Defendant in its breach of trust'
Claims that the ARSM Trust will suffer loss of profit which will accrue from the 'development project'	Paragraph 51 '... the ARSM Trust suffers and will suffer loss and damage including the loss of profit which will accrue from the development of the project'.	Paragraph 17 '... the Plaintiffs including the ARSM Trust has suffered and will suffer loss and damage including the loss of profit which will accrue from the development of the project'.
Prayers on specific performance	'(e) specific performance of the joint venture between the 3rd and 4th Plaintiff and the 4th Defendant'	'(a) specific performance of the said Joint Venture ...'

Prayers on damages	'(f) damages in addition to or alternative to the order for specific performance be assessed against the 4th Defendant'	'(b) damages in addition or in lieu of specific performance'

[23] Hence, we saw no merit in the appellants' stand as they were attempting to relitigate on matters which had been adjudicated before. The principle of res judicata must apply here. Furthermore there was no immediate steps taken by the appellants to set aside the consent judgment.

ISSUE 2

[24] This issue is related to whether the appellants were entitled to the relief of specific performance of the joint venture agreement between the parties.

[25] *Chitty on Contracts* (Vol 1, General Principles, 2015) at 27-003 sets out the parameters of what specific performance entails:

> Scope of the remedy. The jurisdiction to order specific performance of a contractual obligation is based on the existence of a valid, enforceable contract. The scope of the remedy is in one respect wider than that of an action for damages, in that specific performance may be ordered even before there has been any breach. It will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable: these matters are discussed elsewhere in this book. But even if the contract is unimpeachable in these respects, specific performance will not necessarily be ordered; and the present chapter is mainly concerned with limitations on the availability of the remedy where the contract is not defective.

[26] The appellants' contention here was in a nutshell that there was mutual promises between the parties in that the appellants would not be obligated to repay the RM10m loan as the proceeds of the joint venture would be used to repay the aforesaid loan. Put it in another way, the joint venture and the repayment of the loan are interdependent on each other.

[27] With respect, what was submitted was not supported by the evidence adduced in the trial court and this was quite evident from the testimony of Kamil Azman where in cross examination he said as follows:

> CA: Now your prayer is for specific performance of the said Joint Venture referred to in paragraph 13 above.
>
> KAMIL: Yes.
>
> CA: Now in order for there to be specific performance, *you agree there has to be a concluded agreement*?

KAMIL: *Yes*.

...

CA: Can you point out to His Lordship a set of *documents in which the essential terms of the joint venture were agreed*?

KAMIL: *I can't*.

CA: A simple question.

KAMIL: *There was no agreement*.

CA: There is no such document isn't it?

KAMIL: Yes. Right.

CA: And despite that you say you can get specific performance. And that's your understanding?

KAMIL: Yes.

[28] Instructive from the above testimony was the fact that the witness could not inform the court what were the terms of the joint venture agreement. The law is clear in that unless and until the terms of any agreement has been identified with certainty there cannot be any agreement. Here, as rightly pointed out by learned counsel for the respondents, the joint venture agreement was supposed to be for the benefit of ARSM trust and that party was not before the court, thus weakening the position of the appellants.

[29] In any event, the respondents had contended that in the trial the joint venture agreement did not eventuate for the simple reason that the appellants were insisting on Amanah Raya Bhd guaranteeing a fixed profit to be paid to them so that such guaranteed amount would be utilised to pay the outstanding loans due to Amanah Raya Bhd. In the words of Dato Ahmad Rodzi, they read as follows:

> They had insisted on ARD quantifying the profits so that a guaranteed amount will have to be paid to them. This is most unreasonable as there was no way ARD can determine such a figure at that stage. The Plaintiffs were bent on securing a guaranteed figure that they could use to pay their outstanding to ARD under their loans. This was never the basis for the loans or the joint venture. The two were not related at all. The loans to the Plaintiffs and the joint venture were two separate matters altogether.
>
> In the end when it was clear that ARD could not agree with the Plaintiffs to any guaranteed profit under the joint venture, the Plaintiffs kept silent and there was a deadlock. I understand that the Plaintiffs subsequently used the non-execution of the joint venture agreement with ARD as an excuse to not comply with their obligation under the Consent Judgment ...'

[30] The appellants were not able to debunk the aforesaid reason. In any event it is contrary to business sense to forgo the recovery of a debt premised on

a joint venture which may or may not be successful. The recovery of the loan was at all material time the undeniable right of the respondent.

[31] The terms of the consent judgment do not contain words which state that the repayment of the loan amount by the appellants are to be sourced from the proceeds of the joint venture. We must not lose sight that respective parties were represented by legal advisers and if that had been the intention of the parties, such wordings would have been easily inserted in the consent judgment. Without such clear words, the courts cannot infer meanings as put forth by the appellants.

CONCLUSION

[32] This was for us a straight forward case where the appellants tried to renegotiate on a concluded agreement in the form of a consent judgment which in law cannot be set aside except in the exceptional circumstances such as fraud, mistake and total failure of consideration. The learned trial judge had made findings of fact which did not include the aforesaid vitiating circumstances and it had not been shown to us that those findings were findings which were perverse or plainly wrong. And as an appellate court and in those circumstances, we did not intervene and confirmed the decision of the trial judge.

[33] Hence, we dismissed the two appeals with agreed costs in the sum of RM50,000 subject to payment of allocatur fees. We also ordered that the deposit be refunded.

Both appeals dismissed with agreed costs of RM50,000 subject to payment of allocator fees.

Reported by Dzulqarnain Ab Fatar